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U.S. COURT OF FEDERAL CLAIMS

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

Filed: August 11, 2021

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RON RICHARDS and * UNPUBLISHED

SAMANTHA RICHARDS on * behalf of their minor child, C.A.H.R., * No. 20-28001V

Petitioners, * Special Master Nora Beth Dorsey

v. *

SECRETARY OF HEALTH * Dismissal Decision; Influenza (“Flu”)
AND HUMAN SERVICES, * Vaccine; Death.

Respondent. *

* * * * *

Ron Richards and Samantha Richards, pro se, Jefferson, OH, for petitioners.
Colleen C. Hartley, U.S. Department of Justice, Washington, DC, for respondent.

DECISION¹**I. INTRODUCTION**

On January 9, 2020, Ron and Samantha Richards (“petitioners”) filed a petition pursuant to the National Vaccine Injury Compensation Program (“Vaccine Act” or “the Program”), 42 U.S.C. § 300aa-10 et seq. (2012).² Petitioners allege that their minor child, C.A.H.R., died on January 3, 2019 as a result of an influenza (“flu”) vaccination administered on December 11, 2018. Petition at 1.

¹ Because this Decision contains a reasoned explanation for the action in this case, the undersigned is required to post it on the United States Court of Federal Claims’ website in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2012) (Federal Management and Promotion of Electronic Government Services). **This means the Decision will be available to anyone with access to the Internet.** In accordance with Vaccine Rule 18(b), petitioners have 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, the undersigned agrees that the identified material fits within this definition, the undersigned will redact such material from public access.

² The National Vaccine Injury Compensation Program is set forth in Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 to -34 (2012). All citations in this Decision to individual sections of the Vaccine Act are to 42 U.S.C. § 300aa.

Respondent filed a Rule 4(c) Report on June 23, 2020, stating “this case is not appropriate for compensation under the terms of the Act and should be dismissed.” Respondent’s Report (“Resp. Rept.”), filed June 23, 2020, at 2 (ECF No. 11). Thereafter, petitioners were ordered to file an expert report. Order dated Sept. 2, 2020, at 1 (ECF No. 13).

Petitioners were given numerous extensions to file an expert report in support of their claim. However, petitioners’ repeated failure to follow court orders resulted in an Order to Show Cause to issue on June 14, 2021. Order to Show Cause dated June 14, 2021 (ECF No. 25).

Based on the reasons set forth below and in the Show Cause Order dated June 14, 2021, the undersigned **DISMISSES** petitioners’ case for failure to follow multiple court orders and prosecute their case.

II. PROCEDURAL HISTORY

Petitioners filed their claim on January 9, 2020, on behalf of their two children, C.L.H.R. and C.A.H.R. Petition at 1. Petitioners alleged their minor child, C.A.H.R., died on January 3, 2019 as a result of a flu vaccination administered to him on December 11, 2018. Id.

An initial status conference was held on February 20, 2020, and the undersigned ordered the case be severed—C.L.H.R. remained case number 20-28V and C.A.H.R. was to proceed under a new action, case number 20-28001V. See Order dated Feb. 24, 2020, at 1 (ECF No. 3). The undersigned issued an order on February 24, 2020, requesting (1) C.A.H.R.’s birth records, (2) C.A.H.R.’s death certificate, (3) all medical records relating to the death of C.A.H.R., and (4) the medical examiner’s file and autopsy report for C.A.H.R. Id. at 2. On March 23, 2020, petitioners filed medical records for C.A.H.R. ECF Nos. 5, 7.³

The undersigned held a status conference on June 23, 2020, where she ordered petitioners to file (1) records from Rainbow Babies & Children’s Hospital in November 2018 and (2) records from the receiving hospital on January 3, 2019. Order dated June 23, 2020 (ECF No. 10). On that same day, respondent filed his Rule 4(c) Report, recommending against compensation. Resp. Rept. at 2. Petitioners filed their outstanding medical records on August 12, 2020. ECF No. 12.

The undersigned ordered petitioners to file an expert report by November 2, 2020. Order dated Sept. 2, 2020, at 1. On November 2, 2020, petitioners filed a letter stating this case should not be dismissed. Letter, filed Nov. 2, 2020 (ECF No. 16). No expert report was filed. The undersigned directed petitioners to file an expert report by December 18, 2020. Order dated Nov. 4, 2020 (ECF No. 17).

³ These filings appear to be duplicates. Additionally, because the medical records do not contain exhibit numbers, the undersigned will refer to the medical records by their docket entry number.

Petitioners failed to file an expert report or motion for extension of time by the court-imposed deadline and were given a new deadline of February 18, 2021. Order dated Jan. 4, 2021 (ECF No. 20). On February 19, 2021, petitioners filed an unopposed motion for extension of time, requesting additional time to prepare and research. See Order dated Feb. 24, 2021 (ECF No. 22). Petitioners motion was granted, and they were given until April 26, 2021 to file an expert report. Id. at 2.

On March 29, 2021, petitioners filed an “expert report.” ECF No. 23. On review, petitioners’ filing consisted of documents that appeared to be printed from an online or internet magazine purporting to quote from physicians and other health care providers who are critical of vaccination. Order dated Apr. 19, 2021, at 1 (ECF No. 24). The undersigned explained that she did not consider this document to be an expert report. Id. Petitioners were given until June 3, 2021 to file an expert report. Id. at 2. The undersigned indicated that if an expert report was not filed, an order to show cause why this case should not be dismissed for failure to prosecute would be issued. Id. Petitioners failed to file an expert report or motion for extension of time by the court-imposed deadline.

On June 14, 2021, the undersigned issued an order to show cause why this case should not be dismissed. Order to Show Cause dated June 14, 2021 (ECF No. 25). Petitioners were ordered to file an expert report no later than July 14, 2021. Id. at 2. To date, petitioners have not filed an expert report or a motion for extension of time.

This matter is now ripe for adjudication.

III. FACTUAL SUMMARY

A. Pre-Vaccination Medical History

C.A.H.R. was born on July 21, 2017 with no complications. ECF No. 5 at 44, 102. C.A.H.R. received his first Hepatitis B vaccination at the hospital at one day. Id. at 1, 44. On July 24, 2017, C.A.H.R. saw certified nurse practitioner (“CNP”) Dawn Bowen at Rainbow Madison Pediatrics. Id. at 44. Physical examination revealed C.A.H.R. had jaundice through face. Id. at 45. C.A.H.R. was diagnosed with jaundice and ABO incompatibility.⁴ Id.

C.A.H.R. saw Dr. Douglas Fleck at Rainbow Madison Pediatrics for his two-week health maintenance check. ECF No. 5 at 41. Physical examination did not note jaundice. Id. at 42. Dr. Fleck found C.A.H.R.’s “growth and development [] appropriate for age.” Id. at 43.

At C.A.H.R.’s one-month visit on August 17, 2017, his parents were concerned with his poor weight gain. ECF No. 5 at 38. Dr. Fleck’s physical examination revealed blood in his stool. Id. at 39. Dr. Fleck diagnosed C.A.H.R. with a milk protein allergy and blood in stool. Id. C.A.H.R. returned to Dr. Fleck on August 21, 2017 for a follow-up of lower gastrointestinal bleeding. Id. at 35. Diagnoses remained the same. Id. at 36.

⁴ C.A.H.R.’s blood type was B positive, while his mother’s blood type was O positive. ECF No. 5 at 44.

On September 5, 2017, C.A.H.R. saw Dr. Fleck for nasal symptoms and a weight check. ECF No. 5 at 32. C.A.H.R.'s parents reported "nasal congestion, clear nasal discharge, sneezing[,] and cough, but no epistaxis, no fever, no headache[,] and no sore throat." Id. Dr. Fleck's physical examination found no nasal discharge and was otherwise normal. Id. at 33. Diagnoses included milk protein allergy and poor weight gain. Id. C.A.H.R. returned to Dr. Fleck on September 19, 2017 for a weight check. Id. at 29. C.A.H.R. gained 15 ounces in 14 days. Id. Dr. Fleck diagnosed C.A.H.R. with gastroesophageal reflux disease, milk protein allergy, and poor weight gain. Id. at 31. His impression was "failure to thrive," but he noted C.A.H.R.'s current status was "stable and feeding issues [were] improving." Id.

C.A.H.R. saw Dr. Fleck for his two-month well child visit on October 2, 2017. ECF No. 5 at 26. Physical examination was normal. Id. at 27. At this visit, C.A.H.R. received his first diphtheria-tetanus-acellular-pertussis ("DTaP"), second Hepatitis B, first Haemophilus influenzae type B ("HIB"), first pneumococcal ("PCV"), first polio ("IPV"), and first rotavirus vaccinations. Id. at 1-2, 28.

C.A.H.R. next presented to Dr. Fleck on November 28, 2017 for his four-month well child visit. ECF No. 5 at 23. Physical examination was normal. Id. at 24. At this visit, C.A.H.R. received his second DTaP, HIB, PCV, IPV, and rotavirus vaccinations. Id. at 1-2, 25.

On January 23, 2018, C.A.H.R. saw Dr. Fleck for his six-month well child visit. ECF No. 5 at 20. C.A.H.R.'s mother noted that her parents were concerned with C.A.H.R.'s breathing sounding congested. Id. Under history of present illness, C.A.H.R. was noted to have no "serious prior vaccine reactions." Id. Physical examination was normal. Id. at 21. C.A.H.R. received his third DTaP, HIB, PCV, IPV, and rotavirus vaccinations at this visit. Id. at 1-2, 22.

C.A.H.R. presented to CNP Erin Siegal at Rainbow Madison Pediatrics on April 4, 2018 for heavy breathing, runny nose, congestion, and a fever for one day. ECF No. 5 at 17. C.A.H.R.'s mother also reported symptoms of ear pain, cough, and fussiness. Id. Ms. Siegal's otoscopic examination revealed "[t]he right tympanic membrane was red, was bulging, had a loss of landmarks[,] and had a diminished light reflex," and "[e]xamination of the right middle ear showed a middle ear effusion purulent." Id. at 18. C.A.H.R. was diagnosed with type B flu and acute right otitis media. Id. at 19.

On April 24, 2018, C.A.H.R. saw Dr. Fleck for his nine-month well child visit. ECF No. 5 at 14. Under history of present illness, Dr. Fleck noted that C.A.H.R.'s parents were concerned that "[C.A.H.R.] has had prior vaccine reactions." Id. Physical examination revealed C.A.H.R.'s otitis media was resolved. Id. at 15. C.A.H.R. received his third Hepatitis B vaccination. Id. at 1, 16.

C.A.H.R. presented to Dr. Fleck for his twelve-month well child visit on July 24, 2018. ECF No. 5 at 10. Dr. Fleck wrote C.A.H.R. "has not had any serious prior vaccine reactions." Id. Physical examination was normal. Id. at 11. C.A.H.R. received his first Hepatitis A, measles-mumps-rubella ("MMR"), and varicella vaccinations. Id. at 1-2, 12. Blood work and allergy testing were ordered and were normal. Id. at 12-13, 47-53, 88.

On November 11, 2018, C.A.H.R. presented to the emergency department (“ED”) at Conneaut Medical Center for a “20 minute episode of what appear[ed] to be decreased level of consciousness.” ECF No. 12 at 5. Dr. Lisa Kelty wrote EMS arrived at 11:36 AM and found C.A.H.R. “looking towards the left and unresponsive.” Id. On arrival at the ED, C.A.H.R. was crying and had a fever 101.9. Id. C.A.H.R.’s mother stated “[C.A.H.R.] had felt warm last evening” and she “denie[d] any past medical history [or] hospital admissions.” Id. C.A.H.R.’s mother added that “2 other siblings have had febrile seizures.” Id. Dr. Kelty’s neurologic physical examination was normal. Id. Urinalysis, blood work, EKG, and a chest X-ray were ordered. Id. at 6-7. Chest X-ray found no cardiopulmonary abnormalities and nonobstructive bowel gas pattern. Id. at 1, 7. Urinalysis revealed ketones, but was otherwise normal. Id. at 6, 11. C.A.H.R.’s glucose was high, and his sodium and bicarbonate were low. Id. at 7, 13. Blood cultures were normal. Id. at 9-10.

Dr. Kelty noted she was “unsure if 15 minute timeline was met” and discussed this with Dr. Hung at the Children’s ED. ECF No. 12 at 7. She noted Dr. Hung recommended transferring C.A.H.R. because he could have had a complex seizure. Id. Dr. Kelty agreed and transferred C.A.H.R. Id. at 7-8. Dr. Kelty diagnosed C.A.H.R. with non-refractory complex febrile seizure. Id. at 7. At the time of transfer, C.A.H.R. did not have a fever. Id.

C.A.H.R. was transferred to Cleveland Medical Center. ECF No. 12 at 2. C.A.H.R.’s mother reported C.A.H.R. had a tactile fever the day before and he was given Tylenol. Id. C.A.H.R. was with his grandfather when he had a seizure. Id. The grandfather witnessed “his whole body [] shaking for a few seconds and then he went limp. [He] [w]as tired immediately after episode but arousable.” Id. Dr. Yasmin Moftakhar noted C.A.H.R.’s labs were unremarkable. Id. Neurologic physical examination was normal. Id. at 3. Dr. Moftakhar wrote, “[l]ikely fever due to viral infection. . . . Description consistent with a simple febrile seizure at home.” Id. C.A.H.R. was discharged home in stable condition. Id. Diagnosis on discharge was simple febrile seizure. Id.

On November 14, 2018, C.A.H.R. followed up with Dr. Fleck concerning his recent ED visit for a febrile seizure. ECF No. 5 at 7. C.A.H.R.’s parents reported that this was C.A.H.R.’s first seizure, although his siblings have a history of febrile seizures. Id. They added that C.A.H.R.’s symptoms did not include lip smacking or blank stare. Id. Dr. Fleck added that the “[generalized tonic-clonic seizure] lasted a couple [of] minutes followed by post ictal phase.” Id. Physical examination revealed a pink maculopapular rash on chest and abdomen. Id. at 8. Dr. Fleck’s impression was “simple febrile seizure exacerbated by viral illness/exanthem.” Id.

B. Vaccination and Post-Vaccination Medical History

On December 11, 2018, C.A.H.R. saw Dr. Fleck for his fifteen-month well child visit with complaints of runny nose and cough, but no fever. ECF No. 5 at 3. C.A.H.R. was noted to be in good health and to have had no prior serious vaccine reactions. Id. Physical examination was normal. Id. at 4. C.A.H.R. received his fourth DTaP, HIB, and PCV vaccinations, as well as a flu vaccination. Id. at 1-2, 5. Dr. Fleck found C.A.H.R.’s rash was most consistent with

eczema and recommended a hypoallergenic soap and shampoo and to keep the skin cool and moist. Id. at 6.

C.A.H.R. presented to Ashtabula County Medical Center ED on January 3, 2019. ECF No. 12 at 14. C.A.H.R. was unresponsive upon arrival at 9:04 AM. Id. His mother reported that “[C.A.H.R.] went to bed around 9pm last night and was still quiet in his bed this morning when she took her children to school. Upon returning from taking her other children she went to wake [C.A.H.R.] up and found that he was blue and cold so she called EMS.” Id. at 15. C.A.H.R. was lying face down. Id. at 17. C.A.H.R.’s parents reported he “was doing well, eating well.” Id. at 18. Dr. Janardan Tallam’s diagnosis was cardiac arrest. Id.

A coroner’s report from Dr. Pamela L. Lancaster dated March 25, 2019 noted C.A.H.R. was pronounced dead at 9:07 AM on January 3, 2019. ECF No. 5 at 91-92. C.A.H.R. “was basically a healthy child.” Id. at 92. He was found unresponsive in bed, “lying face down on top of the blanket, with his head on a pillow, turned slightly to the side.” Id. Life support efforts were unsuccessful. Id. An autopsy was performed and found “[c]ause of death undetermined following anatomic, microscopic, radiologic, and toxicologic examinations.” Id. at 92, 100. C.A.H.R.’s toxicology results were negative. Id. at 92. The cause of death was determined to be sudden unexplained infant death, and the manner of death was ruled natural. Id. at 92, 101.

IV. DISCUSSION

A. Failure to Prosecute

When petitioners fail to comply with undersigned’s orders to prosecute their case, the undersigned may dismiss the case. Sapharas v. Sec’y of Health & Hum. Servs., 35 Fed. Cl. 503 (1996); Tsekouras v. Sec’y of Health & Hum. Servs., 26 Cl. Ct. 439 (1992), aff’d, 991 F.2d 819 (Fed. Cir. 1993) (table); Vaccine Rule 21(c); see also Claude E. Atkins Enters., Inc. v. United States, 889 F.2d 1180, 1183 (Fed. Cir. 1990) (affirming dismissal of case for failure to prosecute for counsel’s failure to submit pre-trial memorandum); Adkins v. United States, 816 F.2d 1580, 1583 (Fed. Cir. 1987) (affirming dismissal of case for failure of party to respond to discovery requests).

C.A.H.R. received a flu vaccine on December 11, 2018 and was pronounced dead on January 3, 2019, approximately twenty-three days later. Based on the medical records, it does not appear that C.A.H.R.’s death was related to any vaccination due to the lack of temporal association with vaccination. Further, the records provided show that the “[c]ause of death [was] undetermined following anatomic, microscopic, radiologic, and toxicologic examinations.” ECF No. 5 at 100. The medical examiner’s office did not suggest any association with the alleged vaccine.

Petitioners failed to file an expert report in response to the Order to Show Cause, dated June 14, 2021, despite having been given several extensions. Petitioners did file documents they titled an “expert report.” However, “these documents appear to be printed from an online or internet magazine purporting to quote from physicians and other health care providers who are critical of vaccination.” Order dated Apr. 19, 2021, at 1. Further, the undersigned concluded

that the documents did not constitute an expert report. *Id.* Petitioners have now had almost one year to file the requested expert report, and have failed to do so, or failed to explain why they have been unable to file an expert report.⁵ Therefore, the undersigned finds it appropriate to dismiss the case for failure to prosecute.

V. CONCLUSION

Accordingly, for all the reasons stated above, this case is dismissed for insufficient evidence and for failure to prosecute. In the absence of a timely filed motion for review pursuant to Vaccine Rule 23, the Clerk of Court **SHALL ENTER JUDGMENT** in accordance with this Decision.

IT IS SO ORDERED.

s/Nora Beth Dorsey

Nora Beth Dorsey
Special Master

⁵ For Vaccine Program cases that have been dismissed for failure to respond to an Order to Show Cause, see, for example, Byrd v. Sec'y of Health & Hum. Servs., 778 F. App'x 924 (Fed. Cir. 2019); Ghasemipor v. Sec'y of Health & Hum. Servs., No. 20-17V, 2020 WL 7497878 (Fed. Cl. Spec. Mstr. Nov. 23, 2020); Flores v. Sec'y of Health & Hum. Servs., No. 20-157V, 2020 WL 5798502 (Fed. Cl. Spec. Mstr. Sept. 2, 2020); Villalobos ex rel. A.D. v. Sec'y of Health & Hum. Servs., No. 20-96V, 2020 WL 5797865 (Fed. Cl. Spec. Mstr. Sept. 2, 2020); Palencia ex rel. C.A.P. v. Sec'y of Health & Hum. Servs., No. 20-180V, 2020 WL 5798504 (Fed. Cl. Spec. Mstr. Sept. 2, 2020); Button ex rel. W.S.B. v. Sec'y of Health & Hum. Servs., No. 16-1391V, 2017 WL 2876099 (Fed. Cl. Spec. Mstr. June 5, 2017).